May 9, 2007


Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of Ex parte* presentation in MM Docket No. 92-264

Dear Ms. Dortch:

On May 8, 2007, Harold Feld, Senior Vice President, Media Access Project, and Dr. Gregory Rose of Economic Research Services, met with Commissioner Copps and Bruce Gotleib on the above captioned matter.

The parties discussed the channel occupancy limit. Mr. Feld and Dr. Rose made the following points. First, Section 613(f)(1)(B) speaks in terms of programming, not individual programs. Affiliated channels that purchase independent programming cannot satisfy the independent programming requirement of the rule for that purpose. Second, the FCC has discretion to order occupancy based on tier. In setting a limit, the FCC may wish to focus on making capacity in basic tier available and not leave it to the discretion of the cable operator where to place unaffiliated programming.

In addition, the utility of a channel occupancy rule is limited if cable operators can populate the channels with "independent" programming provided by other cable operators or other large programming conglomerates, such as Viacom or Disney. Accordingly, the Commission should consider whether to define the phrase "in which a cable operator has an attributable interest" to include any cable operator, not merely the specific operator (e.g., Comcast could not satisfy the limit by relying on programming provided by Time Warner).

The problem is further complicated because there is no reliable record on the number of programming networks in which cable operators have attributable interests – either in ways already captured under the existing attribution rules or in other ways that allow cable operators to influence programming choices or negotiations with rival MVPDs. As the Commission learned in the *Adelphia* transaction, cable operators treat contracts with programming networks as proprietary information, and are capable of influencing programming and marketing decisions in ways not voluntarily reported in the Commission's annual *MVPD Competition Report*. The allegations made by MASN, for example, indicate that cable operators may demand equity or other forms of influence for programming networks as a condition of carriage in ways that the

1625 K ST., NW SUITE 1000 WASHINGTON, DC 20006 PHONE: (202) 232-4300 FACSIMILE: (202) 466-7656

voluntary filings of cable operators do not reflect.

Accordingly, the Commission should consider an Order and *Further Notice of Proposed Rulemaking* which would (a) create a 30% national horizontal limit; (b) tentatively conclude that the Commission should establish regional limits; (c) establish a 40% channel occupancy limit on basic tier as an interim measure; (d) seek further comment on regional limits and on further data necessary to establish a channel occupancy limit. This later effort should include mandatory requests for information from cable operators with regard to their programming contracts and programming decisions.

In accordance with Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206, this letter is being filed with your office. If you have any questions, please do not hesitate to contact me.

Respectfully Submitted,

Harold Feld
Senior Vice President

cc:
Commissioner Michael Copps
Bruce Gottleib